

ADORE GOLD (PVT) LIMITED
versus
MINISTRY OF LANDS AND RURAL RESETTLEMENT N.O.
and
MR CHIRENJE
and
NORTON TOWN COUNCIL

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 7 November 2013 and 5 February 2014

Opposed matter

V. Zvobgo, for the applicant
No appearance for 1st respondent
Z.W. Makwanya, for the 2nd respondent
No appearance for 3rd respondent

NDEWERE J: The applicant is the registered owner of LOT 1A, Johannesburg Norton, held under Deed of Transfer No. 1231/98.

The background is that in September, 1997, the applicant purchased LOT 1A of Johannesburg at an auction done in terms of a writ of execution issued against Mawanzatsoka (Pvt) Ltd in a matter with Stanbic Bank Ltd under Case No. HC 3242/92. The second respondent, Mr Chirenje was a director of Mawanzatsoka.

The sale in execution was duly confirmed by the Master of the High Court and transfer was passed in favour of the applicant under Deed of Transfer No 1231/98.

The second respondent's wife and co-director of Mawanzatsoka (Pvt) Ltd, Tabeth Chirenje, challenged the sale of the property in execution in the case *Tabeth Chirenje v Adore Gold (Pvt) Ltd and Ors* HC4420/98. Her application was dismissed. She did not appeal against the dismissal of her application. The second respondent himself never mounted a legal challenge of the sale of LOT 1A of Johannesburg, Norton. In his own words, he chose to negotiate a settlement out of court and later he decided to use what he calls "political muscle" in his opposing affidavit. So the sale in execution remained valid as there was no successful legal challenge to it.

Consequently, in 1998, the applicant applied for a subdivision permit which was granted as indicated by Annexure F in the record. In 2002, LOT 1A of Johannesburg was

incorporated into the Norton Town Council area as part of the urban expansion of Norton Town in terms of Proclamation 8 of 2002 published in the Government Gazette of 31 May, 2002. In the meantime, the second respondent approached the Ministry of Lands and Rural Resettlement with an application to lease LOT 1A of Johannesburg in 2004. Pursuant to this, on 12 March, 2009, the second respondent was issued with an offer letter which offered him “the whole of LOT 1A of Johannesburg” for “agricultural purposes”. Paragraph 7 of the offer letter states the following:

“7. The Minister reserves the right to withdraw or change this offer if he deems it necessary, or if you are found in breach of any of the set conditions. In event of a withdrawal or change of this offer no compensation arising from this offer shall be claimable or payable whatsoever.”

In 2011, while the applicant was in the process of pursuing its project on Lot 1A Johannesburg its representative visited Norton Town Council, only to be told by the council that the second respondent was pursuing the same project on the same land. On 18 October, 2011, the applicant filed the current court application in terms of s 14 of the High Court Act [Cap7:06] for an order declaring it the legal owner of LOT 1A of Johannesburg and an order requiring the second respondent to vacate the property and not interfere with the applicant’s project.

On 16 November, 2011, the first respondent who is the Minister of Lands and Rural Resettlement filed a notice of opposition and an opposing affidavit. Paragraph 5 of the opposing affidavit filed on behalf of the Minister of Lands says:

“LOT 1A of Johannesburg was incorporated into Norton Town Council in 2002, thereby making it urban land. However, it was erroneously acquired as agricultural land by the state and an offer letter was issued to the second respondent. The offer letter that was granted to the second respondent is therefore null and void as the acquisition that was done did not pertain to urban land but to agricultural land for farming.

At the time the offer letter was done the first respondent was not privy to the fact that the land in question had since been incorporated into Norton Town Council. In light of the above, the second respondents offer letter is of no force or effect and the first respondent intends to withdraw the second respondent’s offer letter.”

The second respondent filed his opposition papers on 2 November 2011. He says the Sheriff’s sale was irregular because he had already paid the judgment debt by the time the property was sold. He however, conceded that he did not approach the courts for recourse but sought what he calls “political intervention”. He concludes by saying that the property

was duly awarded to him on 12 March, 2009 in terms of the Agricultural Land Resettlement Act [*Cap 20:01*] and he refers to the offer letter he got from the Ministry of Lands and Rural Resettlement.

Unfortunately for the second respondent the affidavit from the first respondent puts holes to his claim. That affidavit stipulates that the offer letter he is relying on is null and void. This is factually and legally correct. The proclamation incorporating LOT 1A Johannesburg into Norton Town Council area was done in 2002. So by 2009 when the offer letter was done, the property was already urban land by a prior Government Act. So indeed, the offer letter which was given to the second respondent in 2009 is null and void because land which had already been proclaimed and gazetted as urban land for urban expansion could not, a few years down the line, be compulsorily acquired for the agricultural purposes covered by the offer letter. And once the offer letter is null and void, then the second respondent's claim to Lot 1 A above has no legal basis because as stated in *Mc Foy v United Africa Company Ltd* 1961 3 ALLER p 1169 at p 1172,

“If an act is void, then it is in law a nullity There is no need for an order of court to set it aside. It is automatically null and void without more ado, ... and every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

The first respondent has said he intends to withdraw the offer to second respondent, but even if there is no withdrawal, the fact still remains that a null and void offer amounts to nothing as stated in the above case.

In his heads of argument, the second respondent objects to the High Court's jurisdiction to hear the current application and he uses s 16 B (3) (a) of the Constitution of Zimbabwe. The second respondent did not raise this objection in his opposing affidavit. Raising the issue for the first time in his heads of arguments is therefore irregular. However, for the avoidance of doubt, it should be noted that s 16 B (3) (a) of the Constitution does not apply to invalid acquisitions and offer letters. So once more the first respondent's affidavit clarifies the issue because the above section applies only if the acquisition is legal and first respondent has conceded that the acquisition and subsequent offer letter was done in error.

On the issue of the sale having been irregular, the case of *Mapedzambo v Commercial Bank of Zimbabwe and Anor*, 1996 (1) ZLR 257 (S) referred to by the applicant is relevant. It states as follows:

“.....under common law, immovable property sold by judicial decree cannot after transfer had been passed, be impeached in the absence of an allegation of bad faith or knowledge of prior irregularities in the sale or fraud.”

The second respondent is free to institute the common law proceedings referred to above and allege bad faith, knowledge of prior irregularities in the sale or fraud but until that is done, the sale and subsequent transfer of LOT 1A Johannesburg to the applicant is valid and lawful. So it is irregular for the second respondent to allege irregularities surrounding the sale in the present proceedings where the Sheriff is not cited as a party.

Consequently, it is ordered that:

1. The applicant be and is hereby declared the legal owner of LOT 1 A of Johannesburg measuring 111, 9776 hectares held under Deed of Transfer number 1231/98.
2. The second respondent be and is hereby ordered to vacate the said plot forthwith and not to interfere with the applicant's project.
3. The second respondent pays the costs of suit.

Messrs Ngarava, Moyo & Chikono, applicant's legal practitioners
Attorney General's Office, 1st respondent's legal practitioners
M.E. Motsi & Associates, 2nd respondent's legal practitioners